

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BARBARA HOLMES
Claimant

VS.

STATE OF KANSAS
Respondent

AND

STATE SELF-INSURANCE FUND
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

[illegible]

Docket No. 172,052

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on March 13, 1998. The Appeals Board heard oral argument on October 28, 1998.

APPEARANCES

Beth Regier Foerster of Topeka, Kansas, appeared on behalf of claimant. Scott M. Gates of Topeka, Kansas, appeared on behalf of respondent and its insurance carrier. Jeff K. Cooper of Topeka, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant to be entitled to benefits for a 5 percent permanent partial disability based on functional impairment. Claimant contends she should receive benefits for a substantially higher work disability.

Claimant filed her brief late in this case and respondent filed a motion asking the Board not to consider the brief based on K.A.R. 51-18-4. But at the time of oral argument, both the respondent and the Fund agreed to the late filing if they would be given two weeks to file their response brief. Respondent and Fund were both given the requested time to file their briefs. They have filed those briefs and the Board has considered the briefs filed by all parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds claimant is entitled to benefits based on a 67 percent work disability.

Findings of Fact

1. On September 16, 1992, claimant injured her low back lifting a laundry bag in the course of her employment for respondent. Claimant had injured her back in 1985 while restraining a patient.

2. For the September 16, 1992, accident, claimant received conservative treatment at St. Francis Hospital, including work hardening, and was released to return to work. Claimant was then referred to Dr. Michael J. Schmidt. Dr. Schmidt treated claimant from January 14, 1993, until February 23, 1996. Other physicians in Dr. Schmidt's office had seen claimant in 1985 and 1986 for musculoligamentous strain of the lumbar spine from which it appeared claimant recovered.

Dr. Schmidt diagnosed, for the 1992 accident, degenerative disc disease and later lumbar strain. An MRI scan showed degenerative disc disease at the L5-S1 level with some bulging more prominent on the left than right. Claimant complained of low back pain with left lower extremity pain aggravated by prolonged sitting, repetitive bending, and heavy lifting. A CT scan showed uptake in the right sacroiliac joint area. Dr. Schmidt concluded the incident of September 16, 1992, aggravated the degenerative disc disease but did not result in disc herniation. Dr. Schmidt also diagnosed chronic lumbar strain.

In August 1994, Dr. Schmidt rated claimant's impairment as 5 percent of the whole body. But Dr. Schmidt recommended gradually more restrictive restrictions as claimant continued to have problems when she returned to work. He originally recommended she be limited to lifting 40 to 50 pounds with no repetitive bending and stooping. By September 21, 1995, Dr. Schmidt recommended light duty status no more than four hours per day, limiting claimant to lifting 15 pounds while avoiding repetitive bending, twisting, or stooping.

Dr. Schmidt determined claimant was totally disabled from working at respondent but not totally disabled from any type of work.

Claimant also complained of symptoms in the mid back and neck which Dr. Schmidt did not consider to be related to the September 16, 1992, accident. At times, Dr. Schmidt also felt claimant was exaggerating her symptoms. He testified that if he were relying on objective criteria only, the restrictions would be the restrictions he originally recommended that claimant not lift more than 40 to 50 pounds and avoid repetitive bending or stooping.

3. Respondent argues that Dr. Schmidt's restrictions (limit working to four hours per day, limit lifting to 15 pounds, and avoid repetitive bending, twisting, or stooping) are for conditions other than those which Dr. Schmidt attributes to the September 16, 1992, accident. Specifically, respondent contends the restrictions are for chronic pain syndrome, and Dr. Schmidt indicated claimant does not have a surgical lesion which would explain this pain. His records also show, as of claimant's last visit in February 1996, it was Dr. Schmidt's impression claimant has a failed back syndrome with no objective radiological data to explain the symptomatology.

Dr. Schmidt testified the restrictions he recommended were for all the low back problems including disc disease and strain. The chronic strain is described as caused by the accident and the disc disease is described as aggravated by the accident. Both were components of the injury.

4. Because of his concern about unexplained symptoms, Dr. Schmidt referred claimant for further evaluations. Respondent selected Dr. Deborah T. Mowery, a physical medicine rehabilitation specialist. Dr. Mowery initially saw claimant on October 27, 1995. Dr. Mowery diagnosed chronic pain syndrome consistent with fibromyalgia, but she did not believe the condition was work related. She also found degenerative arthritis of the SI joint which she could not rule out as being work related. In addition, she diagnosed depression. Dr. Mowery recommended return to work with restrictions of no lifting greater than 25 pounds, no pushing or pulling more than 25 pounds, and start half days and work up to full days.

5. Claimant was examined by Dr. Sharon L. McKinney on October 23, 1995. Dr. McKinney also diagnosed fibromyalgia but, in her opinion, the condition was a work-related injury. Dr. McKinney rated claimant's impairment as 11 percent for the fibromyalgia and 5 percent for degenerative disease at the SI joint for total whole body impairment of 15 percent. Dr. McKinney recommended claimant not lift more than 15 pounds, carry from level more than 20 pounds, and advised claimant should rarely do ladders and stooping. With specific reference to claimant's job, Dr. McKinney advised claimant should not restrain patients.

6. Claimant's condition was also evaluated by Dr. Frederick Wolfe, a rheumatologist at the University of Kansas School of Medicine. Dr. Wolfe was the senior author of the American College of Rheumatology criteria study for the classification of fibromyalgia. He testified to his opinion that claimant does not have fibromyalgia. But he agreed claimant has chronic pain syndrome. He defined chronic pain syndrome as a syndrome in which

the pain is out of proportion to the physical findings. With regard to the cause of the symptoms, Dr. Wolfe concludes the work injury contributed a small amount. Responding to questions by respondent's counsel, Dr. Wolfe wrote:

The final question as to whether there is a "likely or probable correlation or link between her current problem and the alleged accident at work" is a very difficult one to answer. . . . One would ordinarily expect healing to occur for back problems such as this, and I cannot directly link the majority of the symptoms she's having to the accident. It would be my view she should be much more functional than she is at this time. There simply is no way anyone can tell how much work contributed to this, but my sense is that it contributed a small amount. To this extent I would associate my opinion with that of the orthopedic surgeon.

7. Because of his qualifications in this particular area of medical expertise, the Board finds Dr. Wolfe's opinions regarding fibromyalgia to be most persuasive. Based on his testimony, the Board concludes claimant does not have fibromyalgia.

8. Mr. Richard W. Santner, vocational expert, testified regarding the impact of claimant's injury on her ability to perform work in the open labor market and to earn a comparable wage. He reviewed the restrictions recommended by Drs. Wolfe, Arjunan, Mowery, McKinney, and Schmidt, as well as other medical records. In general, he concluded the restrictions would limit claimant to the light category of work with additional limits on stooping and bending activities. Dr. Wolfe's restrictions would limit her to sedentary activity. Her preinjury work had been in the light, medium, and heavy categories. According to Mr. Santner, claimant's loss of ability to perform work in the open labor market would range from 67 percent to 88 percent. Based on Dr. Schmidt's restrictions alone, the loss would be 88 percent, and based on Dr. Wolfe's the loss would be 95 to 98 percent.

Mr. Santner also provided opinions regarding claimant's loss of ability to earn a wage. He opined that claimant should be able to earn \$4.75 to \$5 per hour. If she would be limited to four hours per day the loss would, at a minimum, be 50 percent. Her preinjury wage, including fringe benefits, was \$444.17. Mr. Santner also testified that if claimant were limited to four hours per day, the wage loss would be approximately 78 percent.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1992 Supp. 44-501(a).

2. For injuries in 1992, prior to the substantial statutory revisions in 1993, the Act defined work disability as the loss of ability to perform work in the open labor market and loss of ability to earn comparable wages. K.S.A. 1992 Supp. 44-510e.

3. The Act also provided a presumption that a claimant did not have a work disability, and consequently was limited to disability based on functional impairment, if the employee earned a comparable wage after the injury. K.S.A. 1992 Supp. 44-510e. That same presumption also applies in cases whether a claimant refuses to accept or attempt to perform employment offered at a comparable wage if it appears that employment was appropriate for a person with the claimant's injury. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

4. The primary challenge to an award of work disability in this case is the argument that the recommended restrictions were for a condition or conditions other than the work-related injury. The Board has found most persuasive the testimony and opinions of Dr. Schmidt regarding the nature of the condition claimant suffers and the cause or causes of the injury. Dr. Schmidt's testimony is also consistent with Dr. Wolfe's opinions. As we understand Dr. Schmidt's testimony, part of his rating and part of his restrictions relate to the preexisting disc disease and part to the additional injury caused by the accident of September 16, 1992. But at the time of claimant's injury, in cases involving an aggravation of a preexisting condition, a claimant was entitled to the benefits based on the full resulting disability, including the preexisting disability. *Baxter v. L. T. Walls Constr. Co.*, 241 Kan. 588, 738 P.2d 445 (1987). Dr. Schmidt initially diagnosed aggravation of the preexisting disc disease. When Dr. Schmidt later referred to the injury as a chronic strain, he no longer expressly mentions aggravation of a preexisting condition. Nevertheless, it appears the sprain was superimposed upon the preexisting disc disease and the two combined to produce the impairment and to require the restrictions. Based on the record as a whole, the Board concludes this is the type of circumstance where the full resulting disability, including preexisting condition, is to be considered compensable.

5. While the Board accepts Dr. Schmidt's opinions regarding the nature of the condition and the cause of the impairment, the Board concludes the ultimate restrictions recommended by Dr. Schmidt overstate the extent of the injury. Other physicians recommended less severe restrictions. And it seems that Dr. Schmidt reluctantly recommended the extreme restrictions. He testified the restrictions would be substantially less restrictive if he based the restrictions on objective criteria only.

The Board concludes claimant's loss of ability to perform work in the open labor market is 78 percent. This is the average of the range of loss found by Mr. Santner.

The Board finds the loss of ability to earn a comparable wage is 56 percent. This loss assumes claimant could work a full 40-hour week and assumes the average of the range of her ability as according to Mr. Santner.

6. Giving equal weight to the labor market and wage factors, the Board concludes claimant has a 67 percent work disability. *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on March 13, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Barbara Holmes, and against the respondent, State of Kansas, and its insurance carrier, State Self-Insurance Fund, for an accidental injury which occurred September 16, 1992, and based upon an average weekly wage of \$444.17, for 106.42 weeks of temporary total disability compensation at the rate of \$296.13 per week or \$31,514.15, followed by 308.58 weeks at the rate of \$198.40 per week or \$61,222.27 for a 67% permanent partial disability, making a total award of \$92,736.42.

As of May 28, 1999, there is due and owing claimant 106.42 weeks of temporary total disability compensation at the rate of \$296.13 per week or \$31,514.15, followed by 242.87 weeks of permanent partial disability compensation at the rate of \$198.40 per week in the sum of \$48,185.41, for a total of \$79,699.56, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$13,036.86 is to be paid for 65.71 weeks at the rate of \$198.40 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
Scott M. Gates, Topeka, KS
Jeff K. Cooper, Topeka, KS
Jon L. Frobish, Administrative Law Judge

BARBARA HOLMES

7

DOCKET NO. 172,052

Philip S. Harness, Director